INDIA

Philanthropy Law Report

ICNL
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FOR NOT-FOR-PROFIT LAW

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Cover photo: Gerard McGovern. Icons (page 2): Susannanova (population), Dave Carson (type of government), Piotrek Chuchla (GDP)

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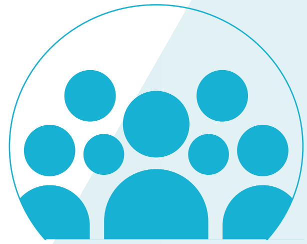
INTRODUCTION

In general, the Republic of India's legal framework is considered relatively supportive of civil society, and particularly supportive of philanthropic giving. Indian culture places great emphasis on *Daana* (giving).

The ancient philosophy of *Nishkama Karma* – "do good without the expectation of getting a reward" – continues to profoundly influence many peoples' lives. In keeping with this philosophy, *Daana* is widely practiced and can take various forms, including *Vastra Daana* (giving clothing), *Anna Daana* (giving grain), or *Shram Daana* (giving voluntary service).

Every individual or household is expected to help the needy and the suffering in some way. In addition to feeding the hungry and providing access to clean water for those without, charitable individuals and groups have built temples, *dharmashalas* (shelters for travelers), schools and colleges, and hospitals and clinics providing free medical services. India also celebrates *Daan Utsav* (Festival of Giving) every year from October 2 to 8, during which people perform acts of kindness by giving their time, material, or money in interesting ways to cause(s) they support. India also takes part in Giving Tuesday, a global movement that promotes the simple idea that everyone, everywhere, has something to give, and every act of generosity counts.

Capital city:
New Delhi



Population:
1,399,179,585
(2023 estimate)

Type of government:
Federal Parliamentary Republic

GDP (purchasing power parity):
$9.279 trillion

GDP per capita:
$6,600

GDP - real growth rate:
8.86%

(all 2021 estimates)

Source: "The World Factbook," The Central Intelligence Agency, accessed April 28, 2023, https://www.cia.gov/the-world-factbook/countries/india/

RECENT DEVELOPMENTS

Foreign Contribution (Regulation) Amendment Act, 2020

The Foreign Contribution (Regulation) Act (FCRA) requires all organizations that receive funding from a foreign source to follow rules regarding registration, funding, limitations on certain activities, and reporting. The Foreign Contribution (Regulation) Amendment Act, 2020, which came into effect in September 2020, revised certain rules under the FCRA. Key changes included: the prohibition of any institution registered under the FCRA to make subgrants using foreign contributions; the reduction of the cap on an institution's administrative expenditures from 50 percent to 20 percent of its foreign contributions; the ability of the Ministry of Home Affairs (MHA) to suspend an organization from receiving or using foreign contributions for 360 days if the MHA believes the organization has violated the FCRA; and the requirement that an organization registered or granted prior permission under the FCRA may only receive foreign contributions through the State Bank of India, New Delhi Main Branch.

Registration under the FCRA is valid for a period of five years, and organizations are required to apply for renewal at least six months prior to the date of expiry of their licenses. The licenses of close to 15,000 organizations expired on September 30, 2021. As of April 2023, thousands of organizations are awaiting renewal of their registrations. The MHA has granted an extension of registration through September 30, 2023 to organizations that applied for renewal on time and are still awaiting approval.

Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021

The Indian Companies Act, 2013 requires companies meeting certain net worth, annual turnover, or annual net profit criteria to spend in each fiscal year a full 2 percent of their average profits over three years on corporate social responsibility (CSR-related activities. In January 2021, the Ministry of Corporate Affairs (MCA) issued the Companies (Corporate Social Responsibility Policy) Amendment Rules, which introduce additional guidelines for the planning, implementation, monitoring and evaluation, reporting, and impact assessment of CSR activities required under the 2013 Act. Most notably, a company may engage with international organizations to design, implement, monitor, and evaluate CSR projects or programs.

The Registrar of Companies can levy a fine or penalty on both the company as well as officers of the company for failure to spend the full 2 percent of the pre-tax profits on CSR activities.

The Finance Bill, 2023

Parliament passed the Finance Bill, 2023 in March 2023. The Act will take effect once the President of India signs the bill and the state publishes it in the Official Gazette.

Once in effect, the Finance Bill, 2023 will limit the amount of money a charitable organization may donate to another charitable organization: only 85 percent of a donation to another organization can be counted towards the donor organization's total application of its income. As a reminder, a key condition for tax exemption for charitable organizations is that these organizations must apply or spend at least 85 percent of their total income every financial year—referred to as application of income. Thus, under the new Finance Bill, if Trust A donates INR 100,000 to another charitable organization, it may only count INR 85,000 towards its application of its yearly income. This new limitation may make it more difficult for purely grantmaking organizations to meet the requirement to apply or spend at least 85 percent of their total income each year.

The Finance Bill, 2023 will also limit the calculation of the use of corpus funds and borrowing of loans towards the application of an organization's income. Previously, if a charitable organization decided to use its corpus fund or to take out a loan, that amount would be counted towards an application of income only in the year in which the organization returns the amount to the corpus fund or repays the loan. Under the Finance Bill, 2023, any use of corpus funds or borrowing of a loan before April 1, 2021 cannot be considered as an application of the organization's income, even when the organization returns the funds to the corpus fund or repays the loan. For amounts taken from the corpus fund or borrowed as a loan after April 1, 2021, a tax deduction will be allowed only if the amount taken from the corpus fund is put back into the corpus or the organization repays the loan within five years of the use of corpus fund or borrowing of the loan.

The prohibition on the application of corpus funds or borrowed loans from before April 1, 2021 towards a charitable organization's income is meant to prevent double tax exemptions. The govern-

INTERNATIONAL RANKINGS

#131

UN Human Development Index (2020)

Scale (best to worst): 1-189

#66

Foreign Policy: Fragile States Index (2021)

Scale (best to worst): 179-1

#14

CAF World Giving Index (2021)

Scale (best to worst): 1-114

Subcategories:

41
HELPING A STRANGER

35
DONATING MONEY

6
VOLUNTEERING TIME

ment believes that organizations that used corpus funds or borrowed loans before April 1, 2021 have already applied them towards their income to receive a tax exemption. Therefore, if an organization is now allowed to count the replaced corpus amount or repaid loan amount towards the 85 percent requirement, it would receive a second tax exemption for the same funds. A knowledgeable expert explains that many organizations have not actually counted the amounts taken from their corpus funds or borrowed in loans before April 1, 2021 towards their 85 percent income application requirement; thus the amendment may prevent charitable organizations from claiming any tax exemption on the use of corpus funds or borrowed loans from before April 1, 2021.

RELEVANT LAWS

India maintains a common law system inherited from the British colonial era. Following Indian independence in 1947, the country adopted its first independent Constitution, which guarantees numerous fundamental human, political, and civil rights for all Indian citizens.

The Constitution allocates power between the central government and the states, enumerating areas delegated to the Union, the states, or both concurrently. Federal (or Union) laws generally extend throughout India; however, states may pass laws within their own territories on issues delegated to them or shared concurrently with the Union. Accordingly, there may be variations in the laws from state to state on certain matters – including those related to nonprofit organizations (NPOs).

Constitutional Framework

Article 19 of the Constitution of India contains the following provisions relevant to NPOs, philanthropic organizations, and philanthropic giving.

Article 19 - Protection of Certain Rights Regarding Freedom of Speech, etc. [excerpt]

> 1. All citizens shall have the right:
>
> a. To freedom of speech and expression;
>
> b. To assemble peaceably and without arms;
>
> c. To form associations or unions or cooperative societies;
>
> 2. Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
>
> 3. Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interest of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
>
> 4. Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

National Laws and Regulations Affecting Philanthropic Giving

Table 1 lists the national laws and regulations affecting philanthropic giving in India.

TABLE 1. NATIONAL LAWS AND REGULATIONS AFFECTING PHILANTHROPIC GIVING IN INDIA

FRAMEWORK LAWS			
Companies (Corporate Social Responsibility Policy) Amendment Rules	**2021**	Federal law that introduces additional rules for corporate social responsibility obligations under the Indian Companies Act.	English
Indian Companies Act	**2013**	Federal law that governs primarily commercial, for-profit organizations, but Section 8 of the Act provides for registration of nonprofit companies.	English
Maharashtra Public Trusts Act	**1950**	State law that governs trusts in the states of Maharashtra and Gujarat.	English
Indian Trusts Act	**1882**	Federal law governing trusts. The Law applies in states that do not have their own Trusts Act.	English
Societies Registration Act	**1860**	Federal law governing societies.	English
LAWS GOVERNING FUNDING			
Foreign Contribution Regulation Act	**2010**	Federal law regulating foreign funding to Indian organizations.	English
Foreign Contribution Regulation Rules	**2011**	Federal rules issued following the Foreign Contribution Regulation Act	English
Foreign Contribution (acceptance or retention of gifts or presentations) Rules	**2012**	Federal rules issued following the Foreign Contribution Regulation Act	English
Foreign Contribution (Regulation) Amend-ment Act	**2020**	Federal law amending the Foreign Contribution (Regulation) Act.	English
Foreign Contribution (Regulation) Amend-ment Rules	**2020**	Federal law amending the Foreign Contribution (Regulation) Rules 2011.	English

TABLE 1. NATIONAL LAWS AND REGULATIONS AFFECTING PHILANTHROPIC GIVING IN INDIA (CONTINUED)

TAX LAWS			
Income Tax Act	**1961**	Federal law with provisions granting tax exemptions for nonprofits and tax deduction for donors.	English
Finance (No.2) Act	**2019**	Federal law granting Principal Commissioner or Commissioner of Income Tax power to cancel registration of charitable trusts.	English
Finance Act	**2020**	Federal law containing amendments to the Income Tax Act, 1961.	English
LAWS OF GENERAL APPLICATION			
Prevention of Terrorism Act	**2002**	Federal law that defines “terrorist” and “terrorist act,” and gives additional authorities to counter-terrorism officials.	English

ANALYSIS

Organizational Forms for Nonprofit Organizations

NPOs usually take one of three legal forms: public charitable trusts, societies, or Section 8 companies. According to the Central Statistics Office of India, there are 3.3 million NPOs registered in India, although this number may include organizations that are no longer active. However, this figure may not be accurate, as there are only about 124,000 tax-exempt organizations and only about 20,000 organizations are registered under the FCRA.

PUBLIC CHARITABLE TRUSTS

Three or more trustees may form and govern a public charitable trust. Such a trust may be established for several purposes, including poverty relief, education, medical relief, the provision of facilities for recreation, or any other objective of general public utility. Indian public trusts are generally irrevocable.

The laws governing charitable trusts vary from state to state. Most states have their own Public Trusts Act. Maharashtra State, for example, governs trusts under the Maharashtra Public Trusts Act, 1950. A similar Act is applicable in neighboring Gujarat State, with some variations. In states that do not have a Trusts Act, the federal Indian Trusts Act of 1882 applies.

SOCIETIES

A society is a nonprofit membership organization formed by seven or more members for a literary, scientific, or charitable purpose. The definition of "society" and the scope of its permissible purposes may vary somewhat based on the relevant state law, although most state laws are based on the federal Societies Registration Act of 1860. Section 20(1) of the federal Act provides that it applies to: "Charitable societies, the military orphan funds,… societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, the diffusion of political education, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, or public museums and galleries of paintings and other works of Art, collections of natural history, mechanical and philosophical inventions, instruments, or designs." The differences among state laws may have implications for NPOs, however. For example, a society registered in Maharashtra or Gujarat is not required to renew its registration periodically. However, a society registered in the northeastern states must renew its registration every year.

A society is usually managed by a governing council or a managing committee. Unlike trusts, societies may be dissolved.

SECTION 8 COMPANIES

A Section 8 company is a nonprofit company that has as its purpose "the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object." It must apply any profits or other income to the promotion of its objectives and must prohibit the payment of any dividend to its members.

Section 8 companies may be either private or public. A private company is formed by two or more "members" (who may also serve as directors), while a public company requires seven or more members (who may serve as directors). Private Section 8 companies do not offer stock to the public; their stockholders are typically the company founders, family members, and/or employees. Private companies also have no duty to disclose their finances to the public, as public companies do.

Unlike trusts and societies, which are generally subject to state law, nonprofit companies are governed by the federal Indian Companies Act, 2013. Section 8 companies were previously registered under Section 25 of the Indian Companies Act, 1956, and therefore used to be called Section 25 companies. The new Act came into force on April 1, 2014.

INFORMAL ORGANIZATIONS

An Indian organization is not required to form a legally recognized entity and may instead operate as an informal organization. However, such organizations do not enjoy tax exemptions, and donors to such organizations do not receive tax deductions on their donations. Accordingly, informal organizations are outside the scope of this report.

NOTE ON COMPLIANCE WITH THE FOREIGN CONTRIBUTIONS REGULATION ACT, 2020

If an organization receives funds from a foreign source for a definite cultural, economic, educational, religious, or social program, then it must register with the Ministry of Home Affairs in accordance with the FCRA. Additional requirements for organizations registered under the FCRA are detailed in the section titled "Compliance under the FCRA," below.

Registration of Domestic Nonprofit Organizations

REGISTRATION AUTHORITIES

Public Charitable Trusts: The registration process for trusts varies from state to state. In states that have their own Trusts Act, a trust can register with the State Charity Commissioner. In states where there is no state Trusts Act or Charity Commissioner, the trustees may register the Deed of Trust with the office of the Registrar of Deeds or Assurances in accordance with the Indian Registration Act. The key registration document is the Deed of Trust. The Deed must specify the name of the trust, the names of its founders and trustees, the purposes of the trust, and how the trust should be governed.

Societies: Societies register with the state Registrar of Societies. The two key registration documents are the Memorandum of Association, which contains the society's name and objectives, as well as names, addresses, and occupations of its founders; and the society's Rules and Regulations.

Section 8 Companies: A nonprofit company may be registered with the Registrar of Companies. The key registration documents are the Memorandum of Association and Articles of Association.

The Federal Income Tax authorities govern all three NPO forms (trust, society, and Section 8 company) for the purpose of tax exemption and deductions. In order to enjoy certain tax benefits, NPOs must register with the Income Tax Department under certain sections of the Income Tax Act, 1961. NPOs must register under Section 12AB in order to obtain tax exemption, and under Section 80G for donors to the organization to obtain tax deductions.

Additionally, the MHA regulates all three NPO forms if they receive foreign contributions. An NPO seeking to receive funds from a foreign source must apply to the Ministry under the FCRA. Please see the section below titled "Compliance under the FCRA" for more information.

PERMISSIBLE FOUNDERS

Founding members of all NPOs must be of majority age (above the age of 18 years). Foreign nationals are not specifically barred from serving as founders of NPOs. If the NPO seeks foreign contributions, however, the organization is less likely to be approved for registration or prior permission under the FCRA if it has a foreign national as a founding member.

Public Charitable Trusts: At least three founders are required to form a trust. In addition to being of majority age, a trustee must be competent to contract, which requires that he or she be "of sound mind" and "not disqualified from contracting by any law to which he is subject."

Societies: At least seven members are required to form a society. There are no specific qualifications for the founders of a society.

Section 8 Companies: Only two members (who may by default serve as directors) are required to register a private Section 8 company. If the company is public, at least seven members are required in order to register.

"The Federal Income Tax authorities govern all three NPO forms for the purpose of tax exemption and deductions. In order to enjoy certain tax benefits, NPOs must register with the Income Tax Department.

ADDITIONAL REGISTRATION REQUIREMENTS

All NPOs are required to have a physical address. This may be the home or business address of a founder or member of the organization or a rented premise.

NPO registration fees are very reasonable and range from INR 500 (approximately $6) for trusts and societies, to INR 1,000 (approximately $12) for nonprofit companies. NPOs often hire lawyers and accountants, who may be considerably more expensive, to assist in the registration process.

Trusts are required to have an initial capital holding of only INR 500 (approximately $6). Societies and nonprofit companies are not required to have initial capital.

PERMISSIBLE PURPOSES

An NPO's stated objectives must fall within a definition of one of the forms described above for the NPO to register and conduct activities.

For the purpose of charitable tax exemptions and tax deductions for donors, an NPO must pursue a "charitable purpose" according to the definition provided by the Income Tax Act, 1961. Section 2(15) of the Act states that "charitable purpose" includes:

- Relief of the poor;
- Education and yoga;
- Medical relief;
- Preservation of the environment (including watersheds, forests, and wildlife);
- Preservation of monuments or places or objects of artistic or historic interest;
- The advancement of any other object of general public utility.

Amendments made under the Finance Acts of 2008, 2010, 2011, and 2015 have affected all organizations falling under the sixth category, primarily limiting the permissible scope of economic activity that an NPO may carry out without losing its tax exempt status.

IMPLEMENTATION

It takes approximately two months to register a trust, society, or Section 8 company in certain states. In practice, an education or health-related organization may face fewer obstacles during the registration process and complete the process more quickly than an advocacy organization or one conducting seemingly commercial activities.

The Income Tax Department may require an additional two months to grant an NPO tax exempt status and process donors' tax deductions. Finally, the MHA could take three to nine months to process applications submitted under the FCRA for an NPO to receive foreign contributions.

Registration of Foreign Nonprofit Organizations

To establish a branch office, liaison office, project office, or other place of business in India, foreign entities (including NPOs, international NPOs, and international donor agencies) must register with the Reserve Bank of India (RBI) under the Foreign Exchange Management Act (FEMA), 1999. However, recent amendments to FEMA under RBI Notification No. FEMA 22(R)/RB-20-2016 require a foreign NPO that receives a foreign contribution for a definite cultural, economic, educational, religious, or social program to register with the MHA in accordance with the FCRA. Please see the section below titled "Compliance under the FCRA" for more information on how to register under the FCRA.

Under FEMA, in addition to submitting Form FNC, a foreign NPO must submit a form to the RBI containing the name of the applicant NPO; date and place of incorporation or registration; contact information; details on the organization's financial holdings; a brief description of its activities; and details as to the location and proposed activities of the organization's branch or liaison office. Unlike branch offices, which may carry out independent activities, a liaison office may only undertake the activities of a liaison; it generally only functions as a channel of communication between the organization's home office abroad and parties in India and is not allowed to undertake any business activity or earn any income in India.

A foreign NPO must also provide details as to what activities it already carries out elsewhere and where they take place. It must additionally attach copies of its articles of association, bylaws, an audited balance sheet, and a report from the organization's bank in its home country stating that the organization is in good standing with a sound financial record over the previous three years. After the 2016 RBI Notification, international NPOs and donor agencies must now make a declaration in amended Form FNC (Annex C) that they will not undertake activities covered by the FCRA and that they understand that any misrepresentation or false information presented by the NPO or donor agency will render void an approval from FEMA.

The RBI considers such applications in coordination with the Finance Ministry. If permission for a foreign NPO to establish a branch or liaison office is granted, the initial permission lasts for three years, after which the NPO must apply for an extension. Liaison and branch offices of foreign NPOs must file Annual Activity Certificates and audited balance sheets showing that they have carried out only those activities permitted by the RBI.

If, instead of operating a branch or liaison office, the foreign NPO decides to register as a trust, society, or Section 8 company in India, all the relevant laws applicable to an Indian trust, society, or Section 8 company would apply. A foreign NPO must operate in India within the scope of the definition provided for each of the three legal forms by the relevant federal or state law. A foreign NPO desiring to enjoy charitable tax benefits and raise funds in India or through foreign sources other than its parent organization must apply for tax exemption and deduction under the Income Tax Act. It must also seek prior permission or registration from the MHA under the FCRA if it wishes to receive foreign contributions.

Nonprofit Organization Activities

POLITICAL ACTIVITIES

NPOs in India may not engage in political campaign activities or undertake a range of advocacy activities related to legislative processes. They are not, however, specifically prohibited from communicating with legislators, other government officials, or the media or encouraging their constituents to do so. Indian NPOs may also lobby for non-political causes, provided that such activity promotes the "general public utility" and is incidental to the attainment of the charity's objectives. Societies, moreover, may have as their primary objective the dissemination of political education, according to the Societies Registration Act, 1860. Although the laws governing the three NPO forms do not clearly define what makes an NPO's activities "political," courts in India have held that an institution or trust whose dominant object is political in character cannot be said to have been established for charitable purposes.

ECONOMIC ACTIVITIES

There are no restrictions on an organization's incidental business, commercial, or economic activities for any of the three legal forms of NPO, provided that the NPO is established for and primarily carries out activities for the relief of poverty or distress, education, or medical relief. An NPO must maintain separate books of account for business, commercial, or economic activities, and any profits received must be applied fully towards charitable objectives. As described further below, however, an organization that has as its purpose the advancement of an "object of general public utility" may not generate business income in excess of 20 percent of its total income from donations and grants. If the above conditions are not satisfied, the NPO will lose its income-tax exemption and its income will be liable to taxation at the maximum marginal rate (30 percent).

PROHIBITION ON DISTRIBUTION OF INCOME OR ASSETS/PRIVATE INUREMENT

Public charitable trusts must benefit a large class of beneficiaries and must be for the public benefit. Moreover, trustees of public charitable trusts may not engage in self-dealing.

The Societies Registration Act does not prohibit the inurement of any earnings of the society to any private shareholder or individual.

The Indian Companies Act, 2013 provides in Article 8 that a limited, nonprofit company must direct any profits towards the realization of the company's objectives and prohibits the payment of any dividend to its members.

In all cases, the Income Tax Act specifically provides that a nonprofit entity will lose its tax-exempt status if the author, founder, or any trustee or his/her/their relative derives any personal benefit. The Income Tax Act further provides that any remuneration paid to a board member "must not be in excess of what may be reasonably paid for such services."[1]

Whether an individual may have a proprietary interest in a nonprofit entity relates to the issue of inurement. For a public charitable trust, the trustees hold trust assets on the trust's behalf. Thus, although trustees have legal title to the trust's assets, they hold these assets for the beneficiaries of the trust, not for themselves. Members of the managing committee or governing council of a society or Section 8 company hold the assets of a society or Section 8 company (Societies Registration Act, Section 5).

REPORTING

Every NPO registered in India is required to keep proper financial records and have them audited annually. They must file returns separately with each of the state and federal registering authorities, such as the Charity Commissioner, Income Tax Department, and MHA. NPOs do not have to regularly report to the government on their activities, though this is often required by donors.

An NPO is permitted to provide grants to individuals or institutions in any amount or proportion, at the discretion of the NPO's governing body, in order to further its objects. However, members of the governing body themselves and their families are not allowed to gain any personal benefit from such a grant, according to the Income Tax Act.

Finally, Section 44 of the Lokpal and Lokayuktas Act, 2013 requires public servants to declare their assets and liabilities in a prescribed manner. The rules under the Act are still being finalized. Once the rules are published in the official gazette and the disclosure forms are finalized, trustees and officers of charitable institutions falling under the definition of "public servant" under sections 14(1)(f), (g), and (h) of the Lokpal and Lokayuktas Act, 2013 will be required to declare their assets to the MHA if their associated institutions receive foreign contri-

1 Income Tax Act, §§ 13(2)(c) and 13(3)(cc) (1961).

> **Every NPO registered in India is required to keep proper financial records and have them audited annually. An NPO must file returns separately with each of the state and federal registering authorities.**

butions in excess of INR 1 million (approximately $12,000) or more per year, or to the relevant ministry if the organization receives a government grant from that ministry in excess of INR 10 million ($120,000) within one fiscal year.

Beyond financial reporting requirements, NPOs are generally not under direct supervision of or obligation to any government authorities. NPOs are generally independent with regard to their internal governance as well. The government has the right to regulate but not control the internal affairs of an NPO. Fines and penalties may be imposed for certain irregularities such as not filing audit returns in time. For instance, the law provides that an NPO that submits its financial returns late will be penalized with a fine ranging from INR 10,000 (approximately $120) to INR 50,000 (approximately $600), or a percentage share of its income – whichever amount is higher. NPOs may also be subject to random financial or tax assessments by the regulatory authorities, at their discretion.

CORPORATE SOCIAL RESPONSIBILITY OBLIGATIONS

The Government of India introduced the Companies (Amendment) Act, 2019 to strengthen companies' compliance with CSR obligations (see Article 21 of the Act). The Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021, which provide additional guidelines on CSR obligations under the Companies (Amendment) Act, 2019, came into force in January 2021.

Under the Companies (Amendment) Act, 2019, companies meeting net worth, annual turnover, or annual net profit criteria must spend in each fiscal year the full 2 percent of their average profits over three years on CSR-related activities. If a company fails to spend the full amount, it may carry forward the unspent amount to the following fiscal year to spend on an ongoing project or projects spread out over a period of more than a year. The company must transfer the funds to a special account designated for that purpose in a bank included in the Second Schedule of the Reserve Bank of India Act, 1934 within thirty days of the end of the fiscal year, and then spend the funds on CSR-related activities within three years of the date of transfer. If the company fails to spend the funds within three years, it must transfer the unspent amount within thirty days of the end of the third fiscal year to the National Unspent Corporate Social Responsibility Fund established by the MHA, which undertakes projects specified in Schedule VII of the Indian Companies Act, 2013.

If the company has no ongoing project, it must, within six months of the end of the fiscal year, transfer the unspent amount to a fund specified in Schedule VII of the Indian Companies Act, 2013, such as the Prime Minister's National Relief Fund or a fund set up by the central government for the socio-economic development, relief, and welfare of "scheduled castes," "scheduled tribes,"[2] or other marginalized groups.

2 "Scheduled caste" and "scheduled tribe" are terms recognized in the Constitution of India and refer to officially designated groups of historically disadvantaged peoples in India.

The Companies (Corporate Social Responsibility Policy) Amendment Rules, 2020 allows companies to undertake CSR activities directly or through a Section 8 company (detailed above in "Section 8 Companies"). The new rules also permit a company to engage with international organizations to design and monitor and evaluate CSR projects.

Additionally, companies that spend over INR 50 million (approximately $610,000) are required to undertake an impact assessment for their CSR projects and disclose the results of the assessment in their annual report on CSR.

REGISTRATION OF FINANCIAL DOCUMENTS AND CERTIFICATES

Effective February 1, 2019, the Institute of Chartered Accountants of India (ICAI) requires practicing member chartered accountants to register all certified financial documents and certificates with unique document identification numbers (UDINs) generated on the ICAI website.

The ICAI introduced UDINs to curb malpractice after observing that financial documents and certificates are often attested by persons misrepresenting themselves as or forging the signatures of member chartered accountants. UDINs will allow funding agencies to verify the authenticity of auditors' utilization certificates.

Among the documents listed by ICAI as requiring UDINs are certificates of fund or grant utilization for charitable trusts and institutions, NGOs, and statutory authorities, and documents issued in compliance with the FEMA, FCRA, and other laws. While chartered accountants rather than NGOs are responsible for generating and citing UDINs on attested certificates, NGOs should ask their auditors to quote UDINs on all utilization certificates. It is expected that over time funding agencies will not accept utilization certificates that do not have UDINs.

Termination, Dissolution, and Sanctions

Indian public charitable trusts are generally irrevocable. If a trust becomes inactive due to the negligence of its trustees, the Charity Commissioner may take steps to revive the trust. Furthermore, if it becomes too difficult to carry out the trust's objectives, the doctrine of cypres, meaning "as near as possible," may be applied to change the objectives of the trust. Under certain circumstances, such as if a trust pursues objectives found to be against state interest or sovereignty, a trust can also be officially declared as inoperative, defunct, or moribund. This is a rare occurrence, however. Finally, to ensure that a charitable trust or institution does not deviate from its objectives, Section 12AA of the Income Tax Act, 1961, which grants tax exemptions to trusts and institutions, was amended in 2018 to allow the Principal Commissioner or Commissioner of Income Tax to cancel the registration of a charitable trust or institution that has engaged in activities not listed in its founding documents. Under the Finance (No. 2) Act, 2019, which amends the Income Tax Act, 1961, the decision to cancel the registration of a charitable trust or institution must be issued in writing, and the affected trust or institution must be afforded a reasonable opportunity to respond.

The government may also unilaterally dissolve a society or Section 8 company if it deems the organization's activities "against national interests or the sovereignty or integrity of India." Upon dissolution and after settlement of all debts and liabilities, any remaining funds and property must be given or transferred to some other society or Section 8 company, preferably one with similar objectives, as determined at the time of the NPO's founding and designated in the NPO's founding documents. The remaining funds and property of the society or company may not be distributed among the members.

A society or Section 8 company may be voluntarily dissolved if the objectives for which it was registered are achieved or are no longer relevant or if the governing body is no longer interested in continuing the organization.

Regarding sanctions, as noted above, NPOs face penalties for the failure to submit their financial reports in a timely manner.

Charitable or Public Benefit Status

In order to obtain charitable status and therefore be eligible for tax exemption and deductible donations under the Income Tax Act, 1961 (see section on Tax Law below), an NPO must have religious or charitable purposes according to the definition provided by the Tax Act. The full definition of "charitable purposes" under Section 2(15) is provided on page 14 under the section "Permissible Purposes."

With its tax benefits, charitable status enables NPOs to more effectively raise donations and receive grants from individual donors, companies, governments, and foreign organizations.

Beyond annual audits and filing of their returns, charitable NPOs are subject to few additional duties in order to maintain their tax-exempt status.

Local and Cross-Border Funding

LOCAL FUNDING

As long as an NPO is registered, it may generally seek and receive funds from local sources to further its charitable purposes without any legal constraints. An NPO may mobilize local

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funds in any lawful manner, including by way of soliciting donations and grants or sponsorships or organizing public fundraising events. NPOs are obligated to issue receipts and keep proper records of such funds.

Donors in India who seek to support either domestic or foreign NPOs must ensure that the NPO is registered. If they wish to receive a deduction, they should ensure that the NPO has also registered with the Income Tax Department and can provide an 80G certificate. A tax-exempt donor organization in India must also ensure that any organization it supports has the same or similar purposes. For instance, a domestic foundation that supports education and health care may lose its tax exemption if it provides support to an NPO that does not have one or both of these issues as its purpose.

On April 18, 2017, an amendment to the Maharashtra Public Trust Act, 1950 was passed to require unregistered organizations and individuals to receive permission from the Assistant or Deputy Charity Commissioner to seek donations. The amendment requires that all such donations and other trans- actions by unregistered bodies and individuals be audited by the Charity Commissioner.

CROSS-BORDER FUNDING

Under the FCRA, all NPOs in India that wish to accept multiple foreign contributions must:

- Register with the Central Government
- Agree to accept contributions through designated banks, and
- Maintain separate books of accounts with regard to all receipts and disbursements of funds.

Beyond the constraints on an Indian NPO's acceptance of foreign funds, NPOs are generally not subject to limitations with regard to contact or affiliation with foreign organizations or persons. Indian NPOs are not permitted to operate internationally, however. The Income Tax Law requires that the funds of an Indian NPO be used exclusively in India. If an NPO seeks to apply funds towards activities outside of India, it must first obtain approval from the Central Board of Direct Taxes.

Compliance under the Foreign Contribution (Regulation) Act

As noted above, all organizations that receive funding from a foreign source must act in accordance with the FCRA. Under the FCRA, foreign contributions include currency, securities, and articles. Funds collected by an Indian citizen in a foreign country on behalf of an NPO registered in India are considered foreign contributions. Moreover, even funds received in India, in Indian currency, are considered foreign contributions if they are from a foreign source. Contributions from an expatriate Indian are not considered "foreign contributions" unless the individual has become a citizen of a foreign country. Commercial receipts are not considered foreign donations. In other words, NPOs may receive consultancy or other commercial receipts from foreign sources without FCRA registration, and FCRA-registered NPOs may deposit commercial receipts in their domestic, non-FCRA-designated bank accounts without having to report the receipts to the FCRA department.

REGISTRATION

The FCRA requires all organizations falling within its scope to register with the MHA. The organization may either apply for a one-time prior permission to receive funds from a single foreign source, or it may register for a five-year permit to receive unlimited foreign contributions from several foreign sources.

To register with the MHA, an organization must submit an online application form (Form FC-3A) on the MHA's online portal. The Intelligence Department has a role in reviewing applications, however, and may delay the process if it has additional inquiries about an NPO applicant. FCRA registration must be renewed every five years.

To register under the FCRA, an organization must already be registered under an existing statute as a trust, society, or Section 8 company, and have been in existence for at least three years, undertaken reasonable activities, and spent at least INR 1,000,000 (approximately $12,000) in aggregate over the last three years in furtherance of its charitable activities, excluding administrative costs.[3]

RESTRICTIONS ON POLITICAL ACTIVITIES

The FCRA bars NPOs that are deemed to be of a "political nature" from receiving foreign contributions. Rule 3 of the Foreign Contribution (Regulation) Amendment Rules, 2020 deems an organization to be of a "political nature" if it "participate[s] in active politics or party politics." The Foreign Contribution (Regulation) Rules, 2011 earlier clarified that an organization can be designated to be of "political nature" on one of many grounds, including:

> **The FCRA bars NPOs that are deemed to be of a "political nature" from receiving foreign contributions. Rule 3 of the Foreign Contribution (Regulation) Amendment Rules, 2020 deems an organization to be of a "political nature" if it "participate[s] in active politics or party politics."**

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3 Section 12 of the FCRA and Rule 9 of the Foreign Contribution (Regulation) Rules, 2011 outline the registration process.

- An organization having avowed political objectives in its Memorandum of Association or bylaws;
- A trade union whose objectives include activities for promoting political goals;
- A voluntary action group with objectives of a political nature or which participates in political activities;
- A front or mass organization such as a students' union, workers' union, or women's wing of a political party; or
- An organization of farmers, workers, students, or youth whose objectives, as stated in the Memorandum of Association, or activities gathered through other material evidence, include advancing the political interests of political parties.

In practice, this often means that an NPO aligned with an opposition party or endorsing an ideology in opposition to the government may be more likely to be deemed "political" and precluded from receiving foreign funds in accordance with the FCRA. The government must notify an organization of this determination and its basis in writing, and the NPO has thirty days to respond.

RESTRICTIONS ON RE-GRANTING

The Foreign Contribution (Regulation) Amendment Act, 2020 prohibits FCRA-registered NPOs from re-granting funds received from a foreign source from its FCRA account to another organization, even if the organization also has clearance from the Home Ministry to receive funds from a foreign source.

RESTRICTIONS ON ADMINISTRATIVE EXPENSES

The FCRA prohibits organizations receiving foreign funds from using more than 20 percent of a foreign contribution to pay administrative expenditures. An "Administrative Expenditure" includes:

- Remuneration and other expenditures for board members and trustees;
- Remuneration and other expenditures for persons managing an NPO's activity;
- Office expenses;
- Costs of accounting and administration;
- Expenses towards running and maintenance of vehicles (unless used for program-related activities);
- Costs of writing and filing reports;
- Legal and professional charges; and

- Rent and repairs to premises.

The following expenditures are not considered administrative in nature:

- Salaries of personnel engaged in training or in collection or analysis of field data for an association primarily engaged in research or training; and
- Expenses related to activities, such as salaries to hospital doctors, salaries to schoolteachers, etc.

REPORTING OBLIGATIONS

The Foreign Contribution (Regulation) Amendment Rules, 2015 increased reporting requirements for organizations registered under the FCRA. For example, these organizations must now post details about the foreign contributions they have received on their websites. Banks must also inform the MHA within forty-eight hours if a foreign contribution is credited to an NPO's bank account.

In a notice issued on June 7, 2019, the MHA mandated that NPOs registered under the FCRA must submit Form FC-6(E) to report any additions, deletions, or changes to office bearers and key functionaries since the time of registration. Failure to do so can result in penalties under the FCRA. In the 2019 notice, the MHA asserts that some organizations have made changes to these positions "without approval from the MHA and without updating this data on a real-time basis through the online application meant for a change of these details." However, the FCRA and its 2011 rules do not actually stipulate that MHA "approval" and updating "on a real-time basis" are required. The rules and Form FC-6 state only that submitting such updates is mandated if there is change in more than 50 percent of an organization's original key members.

SANCTIONS

NPOs face a variety of potential penalties for violations of the FCRA as well. For example, if an NPO accepts and deposits a foreign contribution without registering under the FCRA or having obtained prior approval to do so, the organization is barred from using the contribution and must pay a fine. An FCRA-registered NPO, meanwhile, may have its registration revoked if it accepts a foreign contribution likely to affect prejudicially:

- The sovereignty and integrity of India;
- The security, strategic, scientific, or economic interest of the state;
- The public interest;
- Freedom or fairness of election to any legislature;
- Friendly relation with any foreign state;
- Harmony between religious, racial, social, linguistic, regional groups, castes, or communities.

FCRA registration may also be revoked if the accepted contribution is deemed to "lead to incitement of an offense," or "endanger the life or physical safety of any person." These sanctions apply regardless of the NPO's legal form.

MHA'S WATCHLIST

The MHA maintains a watchlist of donors that support programs that it considers undesirable. Organizations will need to obtain prior permission from the MHA to receive funds from donors on the watchlist. As of September 2019, the list has a total of twenty-two donors, including Amnesty International UK, the Open Society Foundation, and the National Endowment for Democracy, among other major organizations.

Tax Law

The federal Income Tax Act, 1961 governs tax exemption of nonprofit entities. The Act provides that organizations may qualify for tax-exempt status if the following conditions are met:

- The organization must be organized for religious or charitable purposes.
- The organization must spend 85 percent of its income in any financial year (April 1 to March 31) on the objectives of the organization. The organization has twelve months following the end of the financial year to comply with this requirement. Surplus income may be accumulated for specific projects or a capital purpose for a period ranging from one to five years.
- The funds of the organization must be deposited as specified in Section 11(5) of the Income Tax Act.
- No part of the income or property of the organization may be used or applied directly or indirectly for the benefit of the founder, trustee, relatives of the founder or trustee, or a person who has contributed in excess of INR50,000 (approximately $600) to the organization in a financial year.
- The organization must file its annual income returns in a timely manner.
- The organization's income must be applied or accumulated in India. However, trust income may be applied outside India to promote international causes in which India has an interest (such as disaster relief or a cultural exchange), without being subject to income tax.
- The organization must keep a basic record (names, addresses, and telephone numbers) of all donors. According to Section 115BBC, introduced with the Finance Act, 2006, all anonymous donations to charitable organizations are taxable at the maximum marginal rate of 3 percent. Finance Act No. 2, 2009, however, carves out the following exception: Anonymous donations aggregating up to 5 percent of the total income of the organization or a sum

of INR 100,000 (approximately $1,200), whichever is higher, will not be taxed. Additionally, religious organizations, including, temples, churches, and mosques, are exempt from the provisions of this section.

As noted above, nonreligious NPOs must also meet the Income Tax Act's definition of "charitable purpose": poverty relief, education and yoga, medical relief, preservation of the environment, preservation of monuments or places or objects of artistic or historic interest, and a broad category for organizations seeking "the advancement of any other object of general public utility." An amendment to these provisions in 2015 placed new limits on the final category, primarily limiting the permissible scope of economic activity an NPO may carry out without losing its tax-exempt status. The amendment provides that if an organization conducts even limited business activity totaling less than INR 2.5 million (approximately $30,000), it will not be eligible for a charitable purpose tax exemption unless (a) the business activity is undertaken in the course of advancing an objective of general public utility; and (b) the aggregate receipts from the business activity during the previous fiscal year do not exceed 20 percent of the organization's total receipts for that year.

In order to obtain tax exempt status, an eligible NPO must file form 10G with the Income Tax Department. The form requires extensive details about the organization's activities, modes of funding, any business or trade activities it undertakes, and a guarantee that no income or property is being used to benefit any person associated with the organization. If successful, the organization receives an 80G tax deduction certificate, which it may provide to prospective donors. In general, the process of applying for tax exempt status is relatively clear and straightforward.

Foreign NPOs that have established and registered a separate legal entity in India (as opposed to a branch or liaison office) may likewise apply for tax exemption.

The Income Tax Act permits donors to deduct contributions to trusts, societies, and Section 8 companies that have been granted charitable status, as well as institutions specifically listed in

The Income Tax Act permits donors to deduct contributions to trusts, societies, and Section 8 companies that have been granted charitable status, as well as institutions specifically listed in Section 80G of the Act.

Section 80G of the Act. Donors are entitled to a 100 percent deduction for donations to organizations specifically listed in Section 80G, which includes many government-related institutions, such as the Prime Minister's National Relief Fund, the Prime Minister's Armenia Earthquake Relief Fund, the Africa (Public Contributions – India) Fund, and the National Foundation for Communal Harmony.

Donors may deduct 50 percent of their contributions to entities not specifically enumerated in Section 80G, provided the following conditions are met:

- The institution or fund was created for charitable purposes in India;
- The institution or fund has registered as tax exempt under Section 12AA of the Income Tax Act;
- The institution's governing documents do not permit the use of income or assets for any purpose other than a charitable purpose;
- The institution or fund is not designed to be for the benefit of any particular religious community or caste; and
- The institution or fund maintains regular accounts of its receipts and expenditures.

In addition, total deductions may not exceed 10 percent of the donor's total gross income. Further, in order to qualify for a tax deduction, any donation in excess of INR 10,000 (approximately $120) cannot be made by cash.

Companies may also claim the standard 50 percent deduction for charitable donations made to qualifying NPOs through, for instance, their corporate social responsibility programs. Philanthropic individuals and groups are not limited in the amount they may contribute or designate to a charity by India's inheritance law or other law.

An amendment[4] to the Finance Act, 2016 establishes that "accreted income" of a trust or institution registered under Section 12AA[5] would be taxed at the maximum marginal rate (30 percent) under prescribed circumstances. For the purposes of the Act, "accreted income" is the difference between the fair market value of the assets and the liabilities of the trust or institution. Trusts and institutions will be subject to the tax on accreted income under the following circumstances:

- If the trust or institution gets converted into any form which is not eligible for exemption under Section 12AA (e.g., the nonprofit is converted into a for-profit form);
- If the trust or institution is merged with any entity ineligible under Section

4 The amendment adds Sections 115TD, 115TE, and 115TF in Chapter XII-EB.

5 Section 12AA sets forth a tax exemption for NPOs under the Income Tax Act.

12AA (e.g., the nonprofit merges with a for-profit company);

- If the trust or institution, in the case of dissolution, fails to transfer its assets to exempt entities under Section 12AA and Section 10(23C)(iv), (v), (vi), and (via) (e.g., the residuary funds are given to a for-profit entity after dissolution).

The tax on accreted income is to be paid in addition to the income tax on the total income of the trust or institution. The Finance (No. 2) Act, 2019 amended Section 12AA of the Income Tax Act, 1961 to allow the Principal Commissioner or Commissioner of Income Tax to deregister a charitable trust or institution under certain circumstances; once deregistered, the organization is taxed at the maximum marginal rate of 30 percent on the trust's income from the assessment year and also on accreted income.

On March 31, 2017, the Finance Act, 2017 received the assent of the President of India, after modifications by both Houses of Parliament were approved. The law came into effect on April 1, 2017. The Act prohibits charitable organizations from contributing funds to another charitable organization as a corpus donation or grant; limits cash transactions and empowers the income tax authority to enter any place where charitable activities are carried out to inspect an organization's books, verify cash, stock, or valuable articles, and collect any other relevant information.

In September 2016, the Goods and Services Tax (GST) received assent from India's President and became effective in April 2017. The GST addresses concerns regarding differences in taxation at the central and state levels. Previously, different states had different tax rates; the GST institutes a uniform tax rate. Conceptually, GST is similar to VAT, meaning that tax will be applied only on the value added at each point in the supply chain. The GST subsumes ten indirect taxes. The benefits of simplified compliance and a uniform process across India has contributed significantly to the ease of doing business. Once governed by separate laws, taxes like the service tax and the VAT are now governed under a single piece of legislation. A GST Council has been formed to determine the tax rates. Central GST (CGST), State GST (SGST), and Integrated GST (IGST) laws are also in place to implement the new taxation scheme.

EXCEPTIONS

Donations to institutions or funds "for the benefit of any particular religious community or caste" are not tax deductible. An NPO created exclusively for the benefit of a particular religious community or caste may, however, create a separate fund for the benefit of certain marginalized groups, including women and children and certain castes and tribes. Donations to these funds may qualify for deduction under Section 80G, even though the organization may be for the exclusive benefit of only a particular religious community or caste. The organization must maintain a separate account of the monies received and disbursed through such a fund.

In-kind donations are also not tax deductible under Section 80G.

Receipts issued to donors by NPOs must bear the number and date of the 80G certificate and indicate the period for which the certificate is valid. Previously, approval under Section 80G could be for one or more assessment years, not to exceed five. However, the Finance Act, 2009, effective January 10, 2009, eliminated the need for organizations to become frequently recertified. Since that time, an organization need not renew its 80G certificate unless it was specifically revoked.

NPOs are required to upload donor information on the income tax portal using Form No 10BD and providing the name, address, and permanent account number of the donor.

NEWS AND EVENTS

Centre for Advancement of Philanthropy's Blog
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Centre for Advancement of Philanthropy's Facebook Page
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"MCA proposing 'Enforcement' & 'Prosecution' to ensure CSR compliance," The CAP Blog, June 4, 2018
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